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Diplomatic protection

Comments and observations received from Governments

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I. Introduction

1. The International Law Commission completed the first reading of a set of 19 draft articles on diplomatic protection at its fifty-sixth session, held in 2004.[1] The Commission subsequently decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006. By a note dated 19 October 2004, the Secretariat invited Governments to submit their written comments by 1 January 2006.

2. On 2 December 2004, the General Assembly adopted resolution 59/41, entitled "Report of the International Law Commission on the work of its fifty-sixth session", which, inter alia, drew the attention of Governments to the importance for the International Law Commission of having their views, in particular, on the draft articles and commentary on diplomatic protection. The Assembly again drew the attention of Governments to the matter in its resolution 60/22 of 23 November 2005.

3. As at 26 January 2006, written comments had been received from the following 11 States: Austria, El Salvador, Guatemala, Mexico, Morocco, the Netherlands, Norway (on behalf of the Nordic countries Denmark, Finland, Iceland, Norway and Sweden), Panama, Qatar, the United States of America and Uzbekistan. Their comments are reproduced, on an article-by-article basis, in section II below. Additional submissions received will be reproduced as addenda to the present report.

II. Comments and observations received from Governments

General remarks

Austria

The law of diplomatic protection is undoubtedly a classical topic of international law that lends itself to codification. It meets with all the conditions that are decisive for a useful work in this regard. Of course, it could be asked to what extent this legal regime still plays a major role in international law in view of the emergence of the system of human rights. However, as practice reveals, even in recent cases before the International Court of Justice it is still of major importance for the protection of individuals.

Austria appreciates that the International Law Commission boiled down the draft articles to basic rules and concentrated on the secondary norms regarding diplomatic protection; any other approach, such as the attempt to define the breaches of substantive law, would have faced insurmountable difficulties. Consequently, Austria favours the exclusion of any draft article on denial of justice since that is a matter of primary law. The obligation to exhaust local remedies must be distinguished from the State's obligation to offer access to its courts. Likewise, Austria concurs with the Commission that the draft articles neither address the issue

[1] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 59.

of the Calvo Clause nor the clean hands doctrine. Both clauses seem to suffer from the absence of general acceptability.

It seems that the Commission concentrated only on one aspect of diplomatic protection, namely as a right of a State to make certain claims in the interest of its nationals. That right is, however, balanced by the corresponding obligation of the other States to accept such claims by a State. The legal regime on diplomatic protection also stipulates under which conditions a State has to accept such interventions by another State. Such a view undoubtedly sheds some new light on that legal regime and reveals different aspects of it, which the text of the Commission does not sufficiently take into account.

It could further be asked whether other issues should also have been included under the topic, such as the right of international organizations to exercise diplomatic protection, in particular in view of the draft article on the relevant right of the flag State of a vessel. Originally, Austria favoured such a broadening of the topic. However, international organizations still pose major problems with respect to their legal structure, as can be seen in the context of the responsibility of international organizations. For that reason it seems better to put the focus on States alone in order to achieve a manageable legal regime. Nevertheless, this restriction should not be understood as a denial of the necessity to eventually embark on the problem of international organizations which perform an increasing role in international relations even with respect to the protection of individuals.

A further issue that deserves particular consideration is the problem of the relation between the individual whose rights are protected and the State exercising the right to diplomatic protection. It could be considered to address also the problem of the result of the exercise of diplomatic protection and the access of the individual to such a result. Of course, on the one hand, one could argue that this is a matter of the relation between a State and its nationals; on the other hand, however, it should be ensured that the injured individual in whose interest the claim was raised will benefit from the exercise of diplomatic protection.

El Salvador

The Republic of El Salvador considers that a clear distinction should be drawn between the scope of the diplomatic protection envisaged in the draft articles and the protection referred to in the Vienna Convention on Diplomatic Relations[2] and the Vienna Convention on Consular Relations.[3] Otherwise, since we are engaged in the codification and progressive development of international law in this area, we believe that it would be necessary to take due account of the relevant provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, particularly the provisions of article 36 of the latter Convention, which refers to the consular protection to be afforded to a national detained in another State, guaranteeing, moreover, that such nationals shall be granted due process. That provision is of such importance that it has elicited advisory opinions both from inter-American bodies, such as advisory opinion OC-16/99 of the Inter-American Court of Human Rights, and from universal organs, such as the Judgment

[2] United Nations, *Treaty Series*, vol. 500, No. 7310.
[3] United Nations, *Treaty Series*, vol. 596, No. 8638.

of the International Court of Justice in the case concerning *Avena and Other Mexican Nationals*.[4]

We raise the above points because, according to the definition of diplomatic protection proposed in draft article 1, such protection is limited to cases in which a State in its own right adopts the cause of a national and exercises diplomatic protection in accordance with the draft articles in question, which could be interpreted to mean that some consular functions under the Vienna Convention on Consular Relations would be excluded, since there are situations in which the State does not adopt in its own right the cause of a national.

In view of the above, we believe it is important to bear in mind that, at the international level, the concept of diplomatic protection should be distinguished from other concepts of international law that relate to the protection of individuals, particularly in the field of human rights, which imposes precise obligations on States, namely, *jus cogens* and *erga omnes*.

Mexico

As we have noted on previous occasions, diplomatic protection is a key, high-priority concern in Mexico's foreign policy. The Government of Mexico has, accordingly, followed with much interest the development of the International Law Commission's draft articles. Although, in broad terms, it finds the draft articles acceptable, the Government of Mexico wishes to highlight [several] points [in relation to draft articles 9, 14, 16 and 19 (*see below*)].

Mexico wishes to reiterate its comments on the subject of the clean hands doctrine in the light of the present draft articles on diplomatic protection. As the Commission establishes in draft article 1, diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

In that context, Mexico considers that if an individual is or is presumed to be responsible for reprehensible conduct abroad, his State of nationality might, on account of that unfortunate circumstance, decide not to resort to the exercise of diplomatic protection. Nevertheless, this is by no means the same as saying that "clean hands" is a sine qua non for a State's exercise of diplomatic protection. For that reason, Mexico welcomes the Commission's decision to withdraw this topic from the draft articles.

Netherlands

The Netherlands generally supports the draft articles and thus applauds the work of the International Law Commission to date.

The Netherlands notes that in his first report, International Law Commission Special Rapporteur John Dugard already included diplomatic protection within the context of the protection of human rights when he wrote "diplomatic protection

[4] *Avena and Other Mexican Nationals (Mexico v. United States of America)*, judgment, *I.C.J. Reports*, 2004, p. 12 at p. 38, paras. 45-47.

remains an important weapon in the arsenal of human rights protection".[5] The Special Rapporteur also wrote in his fifth report that "the customary international law rules on diplomatic protection that have evolved over several centuries, and the more recent principles governing the protection of human rights, complement each other and, ultimately, serve a common goal — the protection of human rights".[6] The Netherlands fully endorses this position as expressed by the Special Rapporteur.

Seen from the above perspective, the Netherlands regrets that such complementarity of diplomatic protection has not been thoroughly elaborated either in the draft articles or in the commentary. The formulation of some of the draft articles is consonant with current protection of human rights and other developments in international law. The Netherlands considers that the draft articles as they now stand do not provide sufficient elements of or scope for progressive development. Several of the proposals by the Netherlands for the text of the draft articles — draft article 3 for instance — are rooted in the general approach outlined here.

The Netherlands hopes that further discussion will prompt the International Law Commission to pay closer attention to the position of the individual.

...

The Netherlands endorses the conclusions of the Special Rapporteur [in regard to the clean hands doctrine].

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

The complete set of draft articles meets the general satisfaction of the Nordic countries.

The Nordic countries support the chosen approach, on the basis of the main premise that States have a right, not a duty, to exercise diplomatic protection. Moreover, they emphasize that principles and rules of diplomatic protection are without prejudice to the law of consular protection and other applicable rules of international law, including those pertaining to the law of the sea.

Furthermore, the Nordic countries take note of the view of the majority of the members of the Commission with regard to the clean hands doctrine and share the view that the clean hands doctrine should not be included in the draft articles.

Panama

We believe that the draft articles have fully encompassed in their provisions the issues that have traditionally been covered by the topic of diplomatic protection as a mechanism designed to secure redress for an injury to the national of a State. The draft articles deal in detail with the rules governing the nationality of claims and the exhaustion of local remedies.

[5] See A/CN.4/506, para. 32.
[6] See A/CN.4/538, para. 37.

The Republic of Panama accordingly supports the focus of the draft in that it codifies customary rules regarding the conditions for the exercise of diplomatic protection in the most traditional and classical sense. It clearly, for this reason, leaves outside its scope functional and other types of protection, which are provided for by other rules, institutions and procedures.

We agree with the Commission that the general provisions of the draft articles should maintain the distinction between primary rules and secondary rules, with the latter governing the circumstances in which diplomatic protection may be exercised and the preconditions for its exercise. We therefore believe that the aim of the draft is not to address the question of the effects of diplomatic protection and that for this reason it sets aside the application of rules on reparation.

Uzbekistan

We believe that the draft articles on diplomatic protection legalize the longstanding and rather widespread practice of "political lobbying" for property and other interests under foreign jurisdiction. The draft articles are based on the principle that local remedies must be exhausted before diplomatic protection may be exercised by a State. In that respect, we consider the draft articles on diplomatic protection as a means of harmonizing existing practice currently carried out on an individual basis.

It is necessary to define clearly in the draft articles the rights, obligations and responsibilities of States parties with respect to the exercise of diplomatic protection in the case of an injury arising from a wrongful act of another State.

Part one. General provisions

Draft article 1 — Definition and scope

Austria

The gist of draft article 1 is acceptable. However, even though "diplomatic action" does not seem to have a generally accepted meaning, it is necessary to clarify that certain acts, such as protective measures by consulates, do not fall under this term.

Guatemala

With regard to paragraph (7) of the commentary on draft article 1, it is clear that the rules on diplomatic protection are not applicable in cases where a State in whose territory a diplomatic or consular agent exercises his or her functions fails to comply with the obligations relating to such persons incumbent upon it pursuant to the relevant articles of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The above is confirmed by the last sentence of paragraph (4) of the commentary on draft article 15. However, in our view, diplomatic protection should be applicable to injury caused by that State to such persons outside the exercise of their functions and the application of the

aforementioned draft articles. Guatemala is of the opinion that diplomatic protection should, for example, be applicable to the expropriation without compensation of property personally owned by a diplomatic official in the country to which he or she is accredited.

Netherlands

The draft article excludes consular assistance. This exception should perhaps be explicitly indicated in the commentary.

The draft articles differentiate between "diplomatic action" and "other means of peaceful settlement". It is not always clear whether a draft article relates to one or both of these. The Netherlands suggests that the commentary indicate that several draft articles relate only to "other means of peaceful settlement".

Under paragraph (2) of the commentary on draft article 1 [English text], a "wrongful act" must have occurred before diplomatic protection can be exercised. The commentary might state that, outside the framework of these draft articles, a State naturally has many other options for taking the necessary steps to protect its subjects before a "wrongful act" has actually occurred.

The Netherlands considers that the term "its national" is too restrictive because the scope of the draft articles is widened in later ones. Accordingly, a sentence should be added to the commentary which makes it clear that draft article 1 is not intended to exclude draft article 8.

Panama

With regard to who has the right to exercise diplomatic protection and the possibility of doing so, we feel it is important to make it clear that this right belongs to States and that, accordingly, the State's legal interest in exercising diplomatic protection stems from the bond of nationality between the State and the person injured through the wrongful act of another State. Consequently, we consider it appropriate to incorporate into draft article 1 the provision describing the legitimate and peaceful measures that may be adopted by the State when it resorts to diplomatic protection and the distinction maintained in the provision between the two procedures, namely, diplomatic action and other means of peaceful settlement.

Uzbekistan

The term "nationality of a legal person" is used in draft article 1 [Russian text], which is unacceptable, as nationality is an attribute of natural, not legal, persons. Nations are a historically developed form of community of persons with a common language, national character and distinct culture. In this respect, it seems appropriate to change the term "nationality of a legal person" to "State of origin of a legal person", meaning the State where the legal person is established.

Draft article 2 — Right to exercise diplomatic protection

Austria

Although the structure of diplomatic protection as a right of a State has always been discussed — as it is only a fiction that the State is injured through its nationals — draft article 2 raises no major concerns. It reflects the long-standing practice in this regard.

El Salvador

(See General remarks)

Netherlands

Paragraph (3) of the commentary on draft article 2 [English text] states that "(t)he right of a State to exercise diplomatic protection may only be carried out within the parameters of the present articles". Exactly what these parameters are is unclear. The Netherlands believes that, in view of the wording of draft article 2, paragraph (3) should be either deleted or clarified.

Part two. Nationality

Morocco

With regard to draft articles dealing with the question of nationality, it would be advisable for the Commission to take State practice in that area into account when considering these draft articles at the second reading.

Chapter I. General principles

Draft article 3 — Protection by the State of nationality

Austria

Draft article 3, which sets out the fundamental rule of the requirement of the bond of nationality between the injured person and the State exercising diplomatic protection and reflects a basic understanding, raises no major problems.

Netherlands

The Netherlands proposes that paragraph 1 be reformulated to read as follows: "The State of nationality is the State entitled to exercise diplomatic protection". This places greater emphasis on the perspective of the individual.

In addition, it is important to see draft article 3 in the light of European citizenship (that is, of the European Union). There is currently no reason to be more specific on this point, but future developments cannot be predicted.

(*See also General remarks.*)

Chapter II. Natural persons

Draft article 4 — State of nationality of a natural person

Austria

Draft article 4 must be understood *cum grano salis* since nationality is not acquired by State succession but as a consequence of State succession. As a rule, nationality is acquired through the law of the respective State. This law can use as a decisive criterion for the acquisition of nationality one of the facts enumerated in this draft article. In the case of State succession, different criteria could be applied in order to grant nationality as can be seen from the work of the International Law Commission in this regard. It is therefore proposed to reformulate draft article 4 accordingly.

In this context, Austria would like to refer to a problem that does not seem to be addressed in the draft articles. In recent times, the practice has evolved that States delegate their right to exercise diplomatic and consular protection to other States. The best example of this practice is article 20 of the Treaty on European Union[7] according to which an EU-Member State other than the national State may exercise such protection if the national State is not represented in the receiving State. Of course, one could argue that this is not a case of genuine diplomatic protection; it would, however, certainly fall within the purview of the definition of draft article 1 as it is worded now. As a consequence, either it must be clarified that such protection is not addressed by the draft articles, or they would also have to address this problem. At the moment, the draft articles give no clear guidance in this respect.

El Salvador

We should take into account the principles on nationality enshrined in the doctrine of private international law, as we need to establish the relationship to both the positive and negative conflicts of nationality that arise from persons having dual or multiple nationalities or having no nationality. We therefore believe that draft article 4 should distinguish between nationality by birth, whether by *jus soli* or *jus sanguini*, and acquired nationality, as the latter refers to naturalization.

[7] United Nations, *Treaty Series*, vol. 1757, No. 30615, subsequently included as article 20 in the Consolidated Version of the Treaty establishing the European Community, *Official Journal* of the European Communities, C325/33.

Qatar

The draft article is not only clear, but extremely explicit, in that it affirms the absolute right of States to determine, in accordance with their domestic law, who qualifies for their nationality. This is consistent with the position enunciated in international law that "it is for each State to determine under its own law who are its nationals".

Uzbekistan

Draft article 4 indicates the means of acquiring nationality, with the stipulation that those means must be consistent with international law. It seems necessary to point out that the procedures for obtaining nationality are established by national, not international, law and that the means of acquiring it must therefore be consistent with the domestic law of the State in question. These comments relate to draft article 5, paragraph 2.

Draft article 5 — Continuous nationality

Austria

With respect to draft article 5, Austria concurs with the general substance of the draft provision. Nevertheless, it must be kept in mind that it could be sometimes difficult to prove that nationality was acquired in a manner not inconsistent with international law. The wording of this draft article suffers from a certain inconsistency with the definition contained in draft article 1: whereas draft article 5 speaks of "bringing a claim", which indicates a rather formal and even judicial procedure, draft article 1 gives diplomatic protection a broader meaning, also encompassing acts other than merely the bringing of a claim. Harmonization would be useful.

El Salvador

Although draft article 5 does refer to the basic rule of continuous nationality, we are somewhat concerned by paragraph 2. We believe that change of nationality should be addressed in more precise terms in order to ensure that we do not deviate from the basic rule set forth in paragraph 1 of this draft article.

Guatemala

(See comments on draft article 8.)

Netherlands

The Netherlands endorses the regulation proposed in this draft article because it attempts to protect the position of the individual. The Netherlands has studied the question of whether the decision of the International Centre for Settlement of

Investment Disputes in the *Loewen* case is a reason to amend draft article 5. Paragraph 225 of the *Loewen* decision reads as follows:

> Claimant TLI urges that since it had the requisite nationality at the time the claim arose, and, antedate the time that the claim was submitted, it is of no consequence that the present real party in interest — the beneficiary of the claim — is an American citizen. Both as a matter of historical and current international precedent, this argument must fail. In international law parlance, there must be continuous national identity from the date of the event giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.[8]

The Netherlands, however, considers that it is not clear whether the *Loewen* case truly reflects the law as it currently stands. Moreover, application of that rule would have undesirable consequences in cases involving a third country. The following hypothetical situation can serve as an example: Luxembourg undertakes action against an individual of Dutch nationality, which causes injury to that individual. The Netherlands then decides to exercise diplomatic protection, but before the court or arbiter can issue a judgment, the person loses Dutch nationality and acquires German nationality. Application of the *Loewen* criteria would mean that neither the Netherlands nor Germany could then exercise "full" diplomatic protection.

It would be preferable to replace the words "shall not be exercised" in paragraph 3 with "may not be exercised" because "may not" is more in line with the discretionary authority of the State in respect of exercise of diplomatic protection. In addition, "may not" also appears in draft articles 7 and 14. For the rest, "injury caused" is used in the other draft articles and not "injury incurred" as here. Consistency in language is recommended.

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

In draft article 5, a requirement for the exercise of diplomatic protection is continuous nationality. An issue is whether this requirement should apply until the resolution of the dispute or the date of an award or a judgement, and not only until the time of the official presentation of the claim. In practice, however, it can be very difficult to fix the exact point in time of resolution of the dispute. Therefore, the Nordic countries support the chosen approach of the Commission, whereby a State may exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

Qatar

We support the continuous nationality rule that a State is entitled to exercise diplomatic protection in respect of a person who was its national from the time of the injury up to the date of the official presentation or at most until the adjudication

[8] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, International Centre for Settlement of Investment Disputes Case No. ARB(AF)98/3, 42 ILM p. 811 (2003).

of the claim. However, the paucity of cases in which a person can change his or her nationality in such circumstances cannot be used as justification for draft article 5, paragraph 2, since the fact that a case is rare does not preclude the application of the legal principle to all cases, especially those envisaged during the elaboration of the draft articles.

We stress this point because we would like to prevent individuals from attempting to change their nationality to that of a State with greater international influence. The adoption of the principle of continuous nationality would close off this option, enhancing the credibility of the rules on the implementation of the principle of diplomatic protection.

United States of America

Draft article 5, paragraph 1, would require that a person be a national of a State at the date of injury and the date of official presentation of the claim for that State to exercise diplomatic protection in respect to the national's claim. The commentary accompanying the draft article explains that the date of injury will normally coincide with the date on which the injurious act occurs. The commentary also states that "the date of presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection". The article as drafted would leave open the question of whether nationality must be maintained continuously between the period the claim arose and date on which the claim was brought.

Draft article 5, paragraph 2, would create an exception to the continuous nationality rule where the person seeking diplomatic protection has lost his former nationality, has acquired a new nationality for reasons unrelated to the claim and has acquired the new nationality in a manner not inconsistent with international law. Draft article 5, paragraph 3, then would limit this exception by not permitting claims against the former State of nationality where the injury was suffered while the person was still a national of that former State. The draft commentary explains that these rules are designed to allow for claims on behalf of individuals who lost their nationality through State succession, adoption or marriage.

Draft article 10, paragraph 1, would require that a corporation be a national of a State exercising diplomatic protection at both the "time of the injury" and the "date of official presentation of the claim". This draft article also would leave open the question of whether nationality must be maintained continuously between the period the claim arose and date on which the claim was brought.

The United States believes that these draft articles do not accurately reflect customary international law and are not drafted in a manner most tailored for the goals sought to be advanced by the draft articles. We strongly urge, therefore, that draft article 5, paragraph 1, be changed to state:

> "A State is entitled to exercise diplomatic protection only in respect of a person who was a national of that State, or any predecessor State, continuously from the date of injury through the date of resolution of the claim."

Likewise, draft article 10, paragraph 1, should state:

> "A State is entitled to exercise diplomatic protection only in respect of a corporation that was a national of that State, or any predecessor State, continuously from the date of injury through the date of resolution of the claim."

These suggested revisions differ from the Commission's draft in four important respects, as explained below. First, the word "only" is proposed to be added to both proposed draft articles to clarify that these articles limit the scope of diplomatic protection to only those claims where the national in question satisfies the continuous nationality requirement. Second, the end date for the period of continuous nationality requirement should be described as the "date of resolution of the claim" to bring the draft in line with customary international law. Third, nationality should be required continuously between the date of the events giving rise to the claim and the date of resolution of the claim in order to create consistency between the draft and traditional formulations of the rule. Fourth, it is proposed that the effect of a change in nationality brought about by the succession of one State by another should be addressed simply and directly by recognizing that the right to assert diplomatic protection also passes by State succession, thereby obviating the need for draft article 5, paragraph 2, in that respect; there is an insufficient basis to venture into the other areas addressed by draft article 5, paragraph 2, to warrant retaining it. The concerns that prompt these suggestions are addressed more fully below.

First, draft articles 5, paragraph 1, and 10, paragraph 1, intend to limit the right of diplomatic protection found in draft articles 2 and 3 to claims held by persons who meet the continuous nationality requirement. The addition of the word "only" is necessary to achieve that goal, as absent that word it is not clear that these articles are meant to limit the scope of draft articles 2 and 3.

Second, the United States questions the end point for the nationality requirement used in draft articles 5 and 10. The draft commentary states that while there may be a requirement of nationality to the date of resolution, "the paucity of such cases in practice" led to the adoption of "date of presentation of the claim" as the end point for the nationality requirement. The United States is aware, however, of eight specific instances in the context of arbitral decisions and claims presented through diplomatic channels in which the effect of a change in nationality between the presentation and the resolution of the claim was raised and addressed.[9] In each

[9] See Green Haywood Hackworth, 5 Digest of International Law, p. 805 (1943), where American claimant Ebenezer Barstow died after his claim was presented to the Government of Japan, and the United States declined to continue to espouse the claim because the decedent's wife, who was the new owner of the claim, was Japanese; *Eschauzier*, 5 *United Nations R.I.A.A.*, p. 207 (Great Britain v. United Mexican States (1931)), dismissing claim by a former British national who became a United States citizen by marriage after filing the claim; *Guadalupe* (unpublished) (Fr.-Mex. Reorganized Cl. Comm'n 1931), *discussed in* A.h. Feller, The Mexican Claims Commissions, 1923-1934 97 (1935) (tribunal denied claim where French nationality was lost "not only subsequent to the filing but also after the specific claim had been listed as receivable in the Supplementary French-Mexican Convention of 1930"); Biens Britanniques au Maroc Espagnol — Benchiton (Great Britain v. Spain), 2 *United Nations R.I.A.A.*, pp. 615, 706 (1924) (claim denied where claimant lost protected status after first British démarche to Spain concerning claim: "the claim must remain national up to the time of judgment, or at least up to the time of the termination of the argument relating thereto") (translation from 1923-1924

of those instances, the nationality of the claimant or the person on whose behalf the claim was presented changed *after* the date the claim was officially presented to the respondent State but before the claim's final resolution.[10] In each of the cases, the international claim was dismissed or withdrawn when it became known that the claim was now being asserted on behalf of a national of a State other than the claimant State. The arbitral tribunal in *The Loewen Group Inc. v. United States of America* most recently affirmed this principle, stating, "In international law parlance, there must be a continuous national identity from the date of the events giving rise to the claim ... through the date of the resolution of the claim ...".[11]

These cases evidence a clear customary international law rule. In each of these cases, the dismissal or withdrawal of the claims reflected a sense of legal obligation. In each case decided by an arbitral tribunal, the issue was governed by customary international law rather than the specific terms of a treaty. In each case where the claim was withdrawn, it was withdrawn against the interest of the claimant State in receiving compensation from the respondent State for an act it alleged to be internationally wrongful. These cases, in short, reflect consistent State practice. Moreover, as a policy matter this rule is preferable, as it avoids a situation where the respondent State owes the claimant State for an injury to a person that is no longer the legal concern of that State. Draft article 5, paragraph 1, and draft article 10, paragraph 1, should be modified to reflect this rule of international law.

Third, the United States believes that draft article 5, paragraph 1, should be modified to require nationality to be maintained continuously from the date of injury through to the date of resolution. While the United States acknowledges the Commission's concern that there has been limited practice applying this rule, our

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I.L.R., p. 189); Exors. of F. Lederer v. German Government, *3 Recueil des décisions des tribunaux arbitraux mixtes*, pp. 762, 765, 770 (Great Britain-Germ. Mixed Arbitral Tribunal 1923) (where after notification of claim British claimant died leaving German beneficiaries, claim refused: to allow such relief would "be inconsistent with the meaning of the Treaty, for it would lead in effect to payments ... by Germany to German nationals"); Fred K. Nielsen, *American and British Claims Arbitration*, p. 30 (1926) (in the *Hawaiian Claims* case before the American and British Claims Tribunal, the Government of the United Kingdom voluntarily withdrew three claims, "the claimants having acquired American nationality" during the fourteen years between the date the claims were first filed and the date the memorial was submitted); Chopin, 60 *French and American Claims Commission*, 1880-1884, *Records of Claims* (undated) (claim formally presented by France through diplomatic channels on Aug. 30, 1864, withdrawn by May 24, 1883 motion to dismiss claim as to one beneficiary who had since become a U.S. national by marriage); Report of Robert S. Hale, Esq., [1873, Part II, Vol. III] *United States Foreign Relations*, p. 14 (1874) (report of agent before British and American Claims Commission that the commission was unanimous that the claimant in the *Gribble* case lacked standing as a British subject because he "had filed his declaration of intention [to seek U.S. citizenship] ... before the presentation of his memorial, had subsequently, and pending his claim before the commission, completed his naturalization, and was at the time of the submission of his cause a citizen of the United States.").

[10] While most of the examples provided involve cases where the national being protected became a national of the respondent State, in at least one case the national became a citizen of a third State. In *Eschauzier* the United Kingdom brought a claim against Mexico, but had the claim dismissed when the national being protected became a U.S. citizen after the claim's presentation, but prior to it resolution. 5 *R.I.A.A.*, p. 207 (Great Britain vs. United Mexican States (1931)).

[11] *Lowen*, op cit., para. 225 (2003).

proposal is based upon the customary wording of the continuous nationality requirement made by most scholars and international adjudicatory bodies. As noted above, the tribunal in *The Loewen Group, Inc. v. United States of America* defined the nationality requirement as one of "*continuous* national identity from the date of the events giving rise to the claim ... through the date of the resolution of the claim."[12] (emphasis added) In addition to consistency with practice, great dissonance would be created by crafting a continuous nationality requirement and then not requiring continuity of nationality as part of the requirement. We therefore urge the Commission to bring draft article 5, paragraph 1, in line with customary descriptions of the rule made by scholars and tribunals.

Finally, the United States is cognizant of the issue posed with respect to the requirement of continuous nationality by State succession, which does result in a change in designated nationality. However, the United States believes that the right of diplomatic protection passes in State succession, and the right to diplomatically protect in this situation should not be viewed as an exception to the general requirement. As a result, we propose deletion of draft article 5, paragraph 2. Rather, we believe that the issue can best be addressed through the addition of a reference to the "predecessor State" in draft article 5, paragraph 1, and draft article 10, paragraph 1. This proposal makes clear that there is no interruption of continuous nationality created by State succession, as the successor State retains the right to assert protection with respect to the claims of its citizens that were citizens of the predecessor State, provided all other requirements are met. Retention of what is now draft article 5, paragraph 3, ensures that a successor State cannot espouse a claim of a citizen against his former State of nationality.

While our proposed modification to draft article 5, paragraph 1, addresses problems posed by State succession, deleting draft article 5, paragraph 2, leaves unaddressed diplomatic protection of claims of persons whose citizenship has compulsorily changed due to adoption or marriage. The United States questions the factual predicate for this provision since the commentary does not cite any laws mandating loss of citizenship upon marriage to or adoption by a foreigner. In addition, draft article 5, paragraph 2, is in tension with the theoretical underpinnings of diplomatic protection. That paragraph would allow a State to exercise diplomatic protection in respect of an injury suffered when the person who suffered the injury was a national of another State, and thus where the injury in question was one that had an impact only on the international law rights of that other State. This is in contrast to State succession where the new State has succeeded to the international law rights and obligations of the predecessor State and thus is deemed to have had its rights under international law infringed. For the above reasons we propose

[12] Ibid. The panel in *Loewen* is far from the only tribunal or scholar to use this formulation. For example, Professor Brownlie states that the continuous nationality rule requires that a person whose claim is being protected be a national of the claimant State "continuously and without interruption" from date of injury to date of resolution. Ian Brownlie, *Principles of Public International Law* 482-491 (5th ed. 1998). Likewise, F. W. Garcia-Amador states that "predominant opinion both in diplomatic practice and in international case-law" requires that the "injured person was a national at the moment when the damage was caused and *retains* its nationality until the claim is decided". (emphasis added) *See also* Jackson H. Ralston, *The Law and Procedure of International Tribunals*, pp. 188-89 (revised ed. 1926) (criticizing French-American Claims Commission for failing to apply continuous nationality rule where France asserted claim on behalf of national who became American and then French again during the period in which the claim was pending).

deletion of paragraph 2. The proposal by the United States would retain the right of newly created States to exercise diplomatic protection on behalf of their citizens, while avoiding permitting States to exercise diplomatic protection over injuries suffered by other States.

Uzbekistan

(*See the comments to draft article 4.*)

In draft articles 5 and 10, it is proposed to establish in respect of nationals or legal persons a requirement of affiliation with the State presenting the claim, at the time of the injury and at the time a decision on the violation of rights is rendered; that would allow the rights of such parties to be clearly protected.

Draft article 6 — Multiple nationality and claim against a third State

Austria

Whereas paragraph 1 of draft article 6 does not arouse special comments, paragraph 2 requires further comment. In the view of Austria, there is no need of such a provision as there is certainly no doubt that two or more States may jointly act when exercising the right of diplomatic protection. Even if such a clause as that contained in paragraph 2 is lacking, the State to which the claim is presented must accept such a joint démarche. The real problem lies in the possibility that two States may exercise the right of diplomatic protection in a different manner. The commentary deliberately leaves the issue open because of its complexity; in the view of Austria, however, it would be the particular task of the International Law Commission to address even more complicated issues and to provide a solution for them once the Commission refers to the possibility of multiple diplomatic protections. Otherwise, it would be better not to address the issue of joint diplomatic protection since this reference automatically raises the questions just mentioned.

El Salvador

We believe that the text should take account of the rules of private international law on dual and multiple nationality, which provide that States must honour the nationality which is effectively being used. This also relates to the international jurisprudence of the International Court of Justice in the *Nottebohm Case*,[13] which established the precedent of "effective nationality".

Guatemala

With regard to the last part of paragraph (4) of the commentary on draft article 6, it would be interesting to receive some clarification regarding the "general principles" referred to: what are they or where can they be found?

[13] *Nottebohm Case, (second phase)*, judgment, *I.C.J. Reports 1955*, p. 4.

Qatar

We consider that it might be useful to review paragraph 2 in order to make it clearer, so that it either identifies one State as having the right of protection, or lays down criteria to avert any problems that could arise from the filing of separate claims by two or more States. In this regard, we propose the following:

1. That the two States of nationality agree to file a joint claim;

2. That the two States of nationality agree that one of them shall file the claim;

3. That the predominant [effective] nationality be the one that is taken into consideration.

This approach is in line with that taken by Garcia-Amador in his third report on State responsibility submitted to the International Law Commission, where he stated that: "In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties."[14]

Uzbekistan

Draft article 6, paragraph 1, should be worded as follows:

"The State with which a dual or multiple national is most closely connected may exercise diplomatic protection in respect of that national against a State of which that individual is not a national."

Such wording would help to avoid duplication of effort by the States of which the person is a national aimed at protecting his or her rights.

Draft article 7 — Multiple nationality and claim against a State of nationality

Austria

In draft article 7 the International Law Commission has opted for a progressive view in the case of dual nationality. Although that view is inconsistent with the suppression of the requirement of a genuine link in draft article 3, Austria is nevertheless in favour of this draft provision.

El Salvador

El Salvador has certain observations to make regarding the scope of predominant nationality (effective nationality). In our view, this is a very broad term which may give rise to very subjective interpretations.

[14] See A/CN.4/111, in *Yearbook of the International Law Commission*, 1958, vol. II, p. 47 at p. 61.

Morocco

Draft article 7 raises the question of predominant nationality, but does not clearly specify the criteria used to distinguish predominant nationality from nationality pure and simple. Furthermore this sort of hierarchy among nationalities compromises to some extent the sovereign equality of States, which is an immutable principle of both customary law and codified law.

It would therefore be more prudent in this case to refer to the concept of effective nationality as described in the *Nottebohm Case* rather than the concept of predominant nationality, which is not defined in international law, and remains a subjective and ambiguous formulation. This approach would at least have the merit of not challenging the principle of the sovereign equality of States and is, moreover, enshrined in international law.

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

The Nordic countries strongly support the approach of the International Law Commission in draft article 7. In the case of multiple nationality, the State of nationality that is "predominant" both at the time of the injury and at the date of the official presentation of the claim should be entitled to exercise diplomatic protection against another State of nationality of the person concerned. In the view of the Nordic countries, draft article 7 constitutes a codification of existing customary international law. It should be added, for the sake of full clarity, that this rule has no bearing on possibilities to provide consular assistance, which are not governed by the law pertaining to diplomatic protection.

Qatar

In our view, draft article 7 diverges somewhat from the traditional notion of diplomatic protection, which is essentially exercised by the State of nationality against a foreign State that has committed a breach of international law. We also believe that the criterion of predominant nationality is inappropriate in this case, since the two or more States of nationality of the person concerned would have equal legal standing.

Uzbekistan

Draft article 7 uses the phrase "the nationality of the former State is predominant". It is not clear in which cases nationality may be predominant. Evidently, there is a need to take into account that the predominance of one nationality or another depends on the extent to which a national is connected with one State or another (place of residence, work and so on).

Draft article 8 — Stateless persons and refugees

Austria

In the light of the increasing number of refugees, draft article 8 is of particular importance. With regard to stateless persons, the requirement of lawful and habitual residence sets a relatively high standard, but is certainly needed in order to prevent abuse of such rights.

As to the refugees addressed in paragraph 2, it may be asked whether the conditions for the exercise of diplomatic protection are not too restrictive since not only lawful and habitual residence in the State exercising the right of diplomatic protection is required but also recognition by that State of the person as a refugee. It is conceivable for such a person to be lawfully resident in a State different from the one that has granted refugee status; this situation could occur within the European Union. In such a case the refugee would not enjoy any diplomatic protection. It could therefore be asked whether that State would be entitled to exercise diplomatic protection where the person is lawfully and habitually resident once this person has been granted refugee status.

Contrary to the commentary upon draft article 8, Austria proceeds from the assumption that the term "refugee" used in this draft provision is that of the Geneva Convention relating to the Status of Refugees.[15] One cannot expect that a State attaches two different meanings to that term. One must also bear in mind that the legal effect of the right to exercise diplomatic protection consists in the duty of the other State to accept a claim made under this legal title. An open meaning of the term "refugee", as the commentary suggests, would certainly cause problems since the State to which the claims are addressed would depend on the definition of the term refugee by the claimant State. It is therefore advisable to modify the commentary accordingly.

El Salvador

The scope of the term "refugees" used here goes far beyond that which is provided for in the Convention relating to the Status of Refugees and its Protocol,[16] which is the universally accepted definition. Although we do not oppose this usage, it should be carefully considered, as it would constitute a new definition which would need to be introduced and made compatible with the 1951 Convention.

Guatemala

With regard to paragraphs 1 and 2 of draft article 8, Guatemala takes the view that an exception should be made to the continuous nationality rule established in draft article 5, paragraph 1, in respect of a stateless person or a refugee protected by virtue of paragraphs 1 and 2 respectively of draft article 8 if, between the time of the injury and the date of the official presentation of the claim, that person, without

[15] United Nations, *Treaty Series*, vol. 189, No. 2545.
[16] Ibid., vol. 606, No. 8791.

being covered by draft article 5, paragraph 2, acquires the nationality of the protecting State.

Morocco

Although the provision is not part of customary international law or codified international law but rather represents progressive development of the law, it raises no real difficulty given that, on a practical level, the status of that category of persons is of limited duration.

Netherlands

Draft article 8 is one of the few progressive elements in the draft articles. The Netherlands considers this draft article to be a step in the right direction and appreciates the arguments given by the International Law Commission in paragraph (7) [English text] of the commentary.

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

The Nordic countries are particularly pleased that the International Law Commission has drafted a provision on diplomatic protection on behalf of stateless persons and refugees in certain cases. Draft article 8 deviates from earlier opinions to the effect that a State should exercise diplomatic protection only on behalf of its nationals. It is highly important to be able to offer diplomatic protection to these vulnerable categories of persons.

The Nordic countries support the element of flexibility that appears in the commentaries to draft article 8, where it follows that the term "refugee" is not necessarily limited to those persons who fall within the definitions in the Convention relating to the Status of Refugees and its Protocol. The commentaries leave it up to a State to "extend diplomatic protection to any person that it considered and treated as a refugee" (paragraph (8) of the commentaries to draft article 8). It is the position of the Nordic countries that a State may exercise diplomatic protection on behalf of persons fulfilling the requirements of territorial connection to the State exercising diplomatic protection, and which in that State's judgement clearly is in need of protection without necessarily formally qualifying for status as a refugee.

A particular question may be raised with regard to the suggested temporal requirement for the exercise of diplomatic protection in that the stateless person or refugee concerned must have lawful and habitual residence in the State exercising diplomatic protection at the time of the injury and at the date of the official presentation of the claim. Such a requirement would, in the view of the Nordic countries, appear to set an excessively high threshold. In many cases where there is a need of effective diplomatic protection, the injury will in fact have occurred prior to the entry of the person concerned into the territory of the State exercising diplomatic protection.

Thus, the Nordic countries would suggest a consideration of an adjustment of the suggested criteria. Rather than criteria of "lawful and habitual residence" in draft article 8 one may consider criteria of "lawful stay". This is the exact wording used in article 28 of the Convention relating to the Status of Refugees with regard to the issuing of travel documents to refugees.

Panama

We believe that within the traditional system of diplomatic protection, draft article 8, in particular, on diplomatic protection for stateless persons and refugees, is not only relevant and justified but also contributes effectively to the progressive development of international law. Indeed, the adoption of the same norm of protection for both stateless persons and refugees, for which the connecting factor is those persons' lawful and habitual residence in a given State — provided that other additional requirements (family ties, centre of interests, occupational activity, and the like) indicating a genuine link between the individual and the State are met — is the appropriate solution for both categories of persons.

Qatar

Paragraph 2 restricts the granting of legal status to a refugee by the protecting State without taking account of how the term "refugee" is defined under international law. Recently, there have been large waves of migration for a variety of reasons, and we consider that this paragraph should be studied more closely with a view to establishing objective criteria for the protection of refugees in accordance with international norms.

United States of America

(See Other comments and suggestions, below.)

Uzbekistan

In paragraphs 1 and 2, the term "lawfully and habitually resident in that State" should be replaced by "lawfully and permanently resident in that State". In those paragraphs, the phrase "habitually resident" may be interpreted in two ways: either as customarily resident or as permanently resident. We therefore propose that it should read "permanently resident".

In paragraph 2, the words "and has been granted asylum" should be added after the words "as a refugee".

Chapter III. Legal persons

Draft article 9 — State of nationality of a corporation

Austria

Draft article 9 raises major problems by requiring the fulfilment of two conditions: the registered office on the one hand and the seat of the management or some similar connection on the other. Such a requirement for the existence of two criteria would certainly deprive some corporations of diplomatic protection. Nevertheless, as the commentary indicates, the two criteria are those to which the International Court of Justice referred in its judgment on the *Barcelona Traction* case.[17] However, it is interesting to note that the International Law Commission referred, in this context, to some sort of genuine link in conformity with the ruling of the International Court of Justice in the *Barcelona Traction* case whereas in the case of natural persons no such link is required, contrary to the *Nottebohm Case*.

It must nevertheless be emphasized that in certain situations to which the International Court of Justice also referred, other criteria, such as that of control over the corporation, could apply: according to draft article 18 such exceptions necessarily need a conventional base as a *lex specialis*. It could be asked whether the *lex specialis* rule should be confined only to treaties or could also be based on customary international law, as it is imaginable that a State considers itself entitled to apply the concept of control in its claims against a State if both States use this concept of control in their established practice in order to determine the nationality of corporations. Austria would therefore suggest softening the rigidity of this rule reflected in draft article 9.

El Salvador

We wish to know what would happen in the case of a corporation which establishes its registered office or headquarters in a State other than the State in which it was incorporated. Would there be no possibility of diplomatic protection for such corporations?

Guatemala

Draft article 9 appears too elliptical. This can be rectified by dividing it into two paragraphs, the first of which would be paragraph 1 of the text of draft article 17 that appears in footnote 69 of the report of the International Law Commission on its fifty-eighth session.[18] The second paragraph would be a slightly modified version of the current text of draft article 9.

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[17] *The Case concerning the Barcelona Traction, Light and Power Company, Limited*, I.C.J. *Reports*, 1970.

[18] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 70.

If the above proposal is accepted, draft article 9 would read as follows:

"1. A State is entitled to exercise diplomatic protection in respect of an injury to a corporation which has the nationality of that State.

"2. For the purposes of diplomatic protection of corporations, a corporation has the nationality of the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection."

However, there is a problem with paragraph 2 above. The problem arises when, as commonly occurs, a corporation has its registered office or the seat of its management or some similar connection in one State but was formed under the law of another State. In this case, it would seem that no State can exercise diplomatic protection in respect of the corporation. The difficulty could be resolved by replacing the "and" in paragraph 2 with "or". However, if that change is made in the hypothetical case considered, *two* States would be entitled to exercise diplomatic protection. To resolve this new problem, a new third paragraph should be added, which would read as follows:

"3. Whenever the application of paragraph 2 means that two States are entitled to exercise diplomatic protection, the State with which the corporation has, overall, the closest connection shall exercise that protection."

At first sight, the other issues of concern to Guatemala in relation to corporations appear to be merely linguistic, but, in reality, they go deeper.

Anyone with even the most rudimentary knowledge of Anglo-American law knows that under that system the term "corporation" does not apply only to what in French and Spanish are called, respectively, *société anonyme* and *sociedad anónima*, a term found in the original French version of the judgment of the International Court of Justice in the *Barcelona Traction* case and which corresponds, in the English version of the judgment, to the term "limited company whose capital is represented by shares".

However, we are inclined to believe that the word "corporation" in the English version of the draft articles does not cause problems. It is clear that, in that version, that term has the meaning most commonly assigned to it in English-speaking countries, that is, limited company. However, it might be as well to include in the English version of the final text a footnote indicating that in that version the word "corporation" should be understood to mean "limited company whose capital is represented by shares".

Nevertheless, with regard to the French and Spanish versions of draft articles 9 to 12 inclusive, Guatemala is of the opinion that, if those articles are to correspond with the English text, the words "*société*" and "*sociedad*" should be replaced by "*société anonyme*" and "*sociedad anónima*" respectively.

Mexico

Mexico also recognizes, in reading the text, that the comments it has contributed in the past few years concerning the determination of the nationality of corporations for purposes of the exercise of diplomatic protection have been taken into account by the International Law Commission.

Morocco

As it is worded, the draft article uses the [specified] criteria to determine the State of nationality of the corporation. It should nevertheless be noted that the draft article does not specify which State has the right to exercise diplomatic protection with respect to a corporation formed in one State which has had its registered office transferred to another State.

Netherlands

The Netherlands considers that the International Law Commission should research the draft article more thoroughly and that taking into account comparative corporate law and current economic developments would be useful. As the draft article now stands, it excludes the possibility of corporations having dual nationality. In this respect, the Commission's attention may be drawn to corporations with dual nationality in the Netherlands like Unilever and Fortis.

The Netherlands suggests deleting the expression "or some similar connection" because it is too vague. The criteria used in the *Barcelona Traction* case have already been sufficiently adapted in this draft article to fit into different national legal systems. Adding this criterion only creates confusion.

Qatar

The State of Qatar considers, as a matter of principle, that any corporation established under the law of a State must register and have the seat of its management in that State in order for that State to exercise the right of diplomatic protection of said corporation. The draft article is therefore both logical and practical, and obviates, as far as possible, the need to explore the issue of a multiple nationality of corporations.

The phrase "or some similar connection" at the end of the draft article is vague, and could be open to interpretation in the future. It might be preferable, therefore, to consider deleting that phrase or replacing it with one that is more precise.

Uzbekistan

The term "State of nationality of a corporation" [Russian text] should be replaced by "State of origin of a corporation", and a definition of that concept should be inserted in a draft article entitled "Use of terms" (see *Other comments and suggestions* below). Draft article 10 and draft article 11, paragraph (b), require the same changes.

Draft article 10 — Continuous nationality of a corporation

Austria

With respect to draft article 10, the commentary characterizes the case of State succession as one that does not need to be addressed because of its exceptional nature. Recent developments, however, have proved a need for regulation similar to that concerning natural persons. Austria cannot see a reason why in the case of companies no regulation is sought whereas in that of natural persons such a situation is covered. In regard to the application of the continuity rule to corporations in the situation of State succession, the following problems could arise: in most cases of State succession the internal legal order of the predecessor State continues to exist as the law of the newly established State. Hence, corporations incorporated under the law of the predecessor State simply continue to exist under the laws of the new State. However, at the same time, the corporations acquire a new nationality. In such circumstances, the existing wording of draft article 10 could result in the loss of the benefit of diplomatic protection.

Netherlands

The comments on draft article 5 also apply to draft article 10.

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

Consistent with the view [expressed in relation to draft article 5 (*see above*)], the Nordic countries support the approach taken by the Commission when applying the same solution in draft article 10 also with regard to corporations. The exception in draft article 10, paragraph 2, whereby a State may continue to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury has ceased to exist, appears to be sound.

United States of America

(*With respect to paragraph 1, see comments to draft article 5.*)

The commentary accompanying the draft articles acknowledges that the rule in paragraph 2 does not reflect customary international law, but rather is an attempt to address difficulties that may arise when the continuous nationality rule is applied to extinct corporations. However, the commentary does not provide a basis for assessing the likelihood these difficulties would arise, leaving an insufficient policy basis for draft article 10.

The United States disagrees with the Commission that the diplomatic protection of extinct corporations requires an exception to the continuous nationality rule. To begin with, a State may continue to exercise protection with respect to the claims of a corporation so long as the corporation retains a legal personality, which

can be as bare as the right to sue or be sued under municipal law.[19] Many municipal systems allow for corporations to continue to raise and defend claims that arose during corporate life for a finite period of time after dissolution, meaning that legal personality persists until that period expires.[20] Thus, the problem of espousing claims of extinct corporations would arise infrequently, as the vast majority of claims can be considered while the corporation maintains a legal personality.

After the corporation ceases to exist, however, there is a salient policy reason that may oppose the exception proposed. The exception ignores the municipal law policy reasons for allowing the legal personality of corporations to lapse. Municipal survival and corporate wind-up statutes include a finite wind-up period to allow those involved with a corporation to obtain the benefits of finality, knowing that after the wind-up period has ended claims for and against the corporation will cease.[21] Draft article 10, paragraph 2, threatens to undermine this finality, and the resource allocation decisions that accompany it, by allowing for claims involving the corporation to persist indefinitely after the life of the corporation has ended.

Uzbekistan

(See the comments to draft articles 5 and 9.)

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[19] The International Court of Justice explained in *Barcelona Traction* that the company there had not "ceased to exist" because it remained free to exercise its legal rights in Spanish courts, its financial problems notwithstanding. As the Court stated, "a precarious financial situation cannot be equated with the demise of the corporate entity ... the company's status in law is alone relevant" (*Case concerning Barcelona Traction Light & Power Company, Limited. (Belgium v. Spain), 1970 I.C.J.* 3, p. 41 at para. 66).

[20] In most jurisdictions in the United States, for example, corporations may sue and be sued for up to three years after dissolution (Model Business Corporation Act § 14.07 (2002)); *see also* Delaware Code Annotated Title 8, § 278 (2005) (three-year period for claims after corporate dissolution). The Model Business Corporation Act and the Delaware Code are considered the reference codes for United States corporation law. Other States allow claims that arose during the life of the corporation for periods ranging from two years after dissolution to forever, subject to the statute of limitation for the claim. *See* 805 Illinois Compiled Statutes 5/12.80 (1998) (claims for or against corporation that arose prior to dissolution may be pursued for up to five years after dissolution); New York Business Corporation Law § 1006(a)(4) (any claims for or against corporation that arose prior to dissolution enforceable with no time limit); 15 Pennsylvania Consolidated Statutes Annotated § 1979 (two-year limit to claims for or against corporations after dissolution). Other nations have similar laws to address the legal personality of a corporation following dissolution. In the United Kingdom, corporations may sue or be sued for up to two years after dissolution with court permission (Companies Act, 1985, c. 6, § 651). In Canada, court permission is also required before a dissolved corporation may sue or be sued, although no time period appears to limit that right (Canada Business Corporations Act, R.S.C., chap. C-44, § 209 (2004) (Can.)). The French commercial code permits claims to be considered for and against corporations for up to three years after dissolution (Code Commercial, art. L. 221-1-237-31).

[21] It is for this reason that, at least in the United States, claims that remain unresolved during the corporate wind-up period are generally abated when that period ends. William M. Fletcher, 16 *Fletcher Cyclopedia of the Law of Private Corporations* § 8144.40 (2005).

Draft article 11 — Protection of shareholders

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

With regard to the exercise of diplomatic protection on behalf of shareholders, the Nordic countries are content that the Commission has ensured overall consistency with the case law of the International Court of Justice, based on the *Barcelona Traction* case.

The 1970 judgment of the International Court of Justice strikes a fair balance between the interests of the company and the interests of the shareholders, and enhances legal clarity. The Nordic countries agree against overturning the basic rule that diplomatic protection on behalf of a company primarily be made by the State of nationality of the company. Moreover, inability to claim protection from their own Government is perhaps one of the commercial risks that shareholders undertake when buying shares in foreign companies.

Subparagraph (a)

Austria

As to draft article 11, subparagraph (a), it may be asked why the wording only refers to "State of incorporation" instead of nationality as is done in the other relevant draft articles taking into account the double criteria required for the nationality. The effect of this paragraph is very broad since its wording addresses situations where a company has the nationality of State A and is terminated in that State "according to the law of the State of incorporation", but is injured by State B. If shareholders of the company have the nationality of States C and D, which could give rise to a multiplicity of claims, the restriction of "a reason unrelated to the injury" makes very little sense, since the State where the company is terminated differs from the injuring State. This clause is useful only if this provision is meant also to address corporations that were the national of the injuring State at the time of the injury and that, as a result of the injury, have ceased to exist according to the law of that State. In order to be as clear as necessary, Austria suggests formulating the two issues in two separate paragraphs.

El Salvador

With regard to draft article 11, subparagraph (a), which addresses the case of the protection of shareholders when the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury, but does not provide for the case of shareholders of a corporation that ceases to exist as a result of the injury, it would appear that the more the rights of shareholders are injured, the less their States of nationality can exercise diplomatic protection.

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

The Nordic countries support, at the same time, the exceptions suggested in draft article 11, subparagraphs (a) and (b).

United States of America

The United States strongly urges the International Law Commission to delete draft article 11, subparagraph (a), because it creates the anomalous situation of granting States of shareholders a greater right to espouse claims of a corporation than the State of incorporation itself. At least under United States law, shareholders do not have any right to assert the expired rights of a dissolved corporation[22] because the corporation is the primary vehicle for protecting its own rights. It is for that reason that the International Court of Justice in *Barcelona Traction* held that the State of incorporation should exercise diplomatic protection with respect to injuries to the corporation. The commentary provides no justification for creating a category of claims where States of shareholders can espouse corporate claims and the State of incorporation cannot. Owing to this rule's inconsistency with basic corporate law principles, it should be deleted. Doing so would in no way infringe upon the right of States of shareholders to espouse claims for the direct injuries suffered by shareholders, of course, which is permitted by draft articles 2 and 3.

Subparagraph (b)

Austria

Draft article 11, subparagraph (b), raises the question of the injury since it is not clear which kind of injury is meant in this context, in particular, whether it should be understood in the sense of draft article 1 that speaks of "injury to that national arising from an internationally wrongful act of another State". Read in conjunction with the introductory phrase it becomes clear that the injury referred to in draft article 11, subparagraph (b), must be inflicted upon the company. Since the company, however, has the nationality of the State causing "injury", this injury could hardly be one "arising from an internationally wrongful act of another State". The commentary does not provide an answer to this question; in order to remove any doubts on this issue, it would be advisable to clarify this issue in the commentary.

[22] William M. Fletcher, 16 *Fletcher Cyclopedia of the Law of Private Corporations* § 8144.40 (2005), describing how United States law does not permit shareholders to raise expired rights of dissolved corporation. The United States is generally one of the more permissive States regarding shareholder actions on behalf of the corporation, suggesting other States may not permit shareholder suits to enforce the rights of deceased corporations either. Bernhard Grossfield, 13 *International Encyclopedia of Comparative Law*, p. 107, explaining that the United States is generally more favourable than other States towards representative suits by shareholders.

Netherlands

The draft article seems to have stirred controversy in the Sixth Committee. The International Law Commission has attempted to codify the two exceptions as formulated in the *Barcelona Traction* case. The Netherlands agrees with the Commission that the State of nationality of the shareholder in cases of Calvo cooperation would be entitled to exercise diplomatic protection.

Paragraph (b) reads "alleged to be responsible for causing injury". In draft article 14, paragraph 2, the wording is different: "alleged to be responsible for the injury". The wording of the draft articles should be consistent.

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

(See comment to subparagraph (a).)

A State should not be allowed to require foreign interests to incorporate under local law as a condition for doing business in that State and then plead such incorporation as the justification for rejecting the exercise of diplomatic protection from the State of nationality of the foreign interests.

According to the commentaries to draft article 11, subparagraph (b), this exception applies to cases where the requirement of incorporation under local law as a precondition for doing business is a formal requirement contained in the local legislation. There are, however, as a part of the progressive development of international law, good reasons to extend this exception also to cases where the requirement of incorporation is not a formal one, but follows from pressure of an informal or political nature on the foreign interests. The Nordic countries suggest that the existing wording of draft article 11, subparagraph (b), "was required by it as a precondition for doing business there" should also cover such requirements of an informal nature. This should then be reflected in the commentaries to draft article 11, subparagraph (b).

United States of America

The United States has serious concerns about draft article 11, subparagraph (b). As we have previously explained to the International Law Commission, the proposed exception lacks support in customary international law. In all of the cases provided by the Commission as evidence for the exception, there was in fact a special agreement between two States granting a right to shareholders to claim compensation, or an agreement between the injuring State and its national corporation granting compensation to the shareholders.[23] As a result of those

[23] Delagoa Bay Railway Co. *in* J. B. Moore, 6 *Digest of International Law*, p. 647 (1906), resolved through agreement between the United States, United Kingdom and Portugal to refer to international arbitration question of compensation owed U.S. and U.K. shareholders due to Portuguese expropriation of Portuguese company; Mexican Eagle (El Aguila) (1947) *in* M. Whiteman, 8 *Digest of International Law*, p. 1274 (1967), dispute between the United Kingdom and Mexico over Mexican nationalization of oil fields owned by Mexican corporations controlled by British interests resolved through settlement between Mexican government and

agreements, the above-mentioned cases provide little support for the existence of a customary international law rule allowing States to espouse claims of shareholders against the State of incorporation where incorporation was mandated for doing business in the State. Likewise, the International Court of Justice in *Barcelona Traction* had no occasion to consider the validity of the exception, as the injuring State in that case was not the State of incorporation.

Absent this customary international law support, the United States has concerns about whether there is a sound public policy basis for this exception. As we have previously stated, this exception would create a regime where shareholders of corporations incorporated in a State have greater rights to seek diplomatic protection of their claims in that State than shareholders of foreign-owned corporations, who would have to rely on the corporation's State to pursue claims. It is not clear that such a result is just.

Uzbekistan

(See the comment to draft article 9.)

Draft article 12 — Direct injury to shareholders

United States of America

The United States believes that draft article 12 would codify customary international law by stating that the State of nationality of shareholders is entitled to exercise diplomatic protection on behalf of shareholders where they have suffered direct losses. That statement is superfluous here. Draft articles 2 and 3 would clarify that a State has the right to exercise diplomatic protection in respect to claims of its nationals where the other requirements of the draft articles are met. Since shareholders are nationals, like all others, there is no reason to adopt a separate article to note that their claims are permissible. Rather, if the International Law Commission feels it is necessary, the commentary to draft articles 2 and 3 should include a statement that shareholders too are nationals whose injuries are eligible for diplomatic protection.

Draft article 13 — Other legal persons

Austria

Austria emphasizes the importance of draft article 13 in view of the existence of different kinds of legal persons under Austrian national law.

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company; Romano-Americano in Hackworth, 5 *Digest of International Law*, p. 841 (1943), dispute settled by Romanian offer to pay Romanian oil company compensation for assets seized; El Triunfo (United States v. El Salvador) (1902) 15 *United Nations R.I.A.A.*, p. 467 (1991) (protocol between the United States and El Salvador agreed to refer to international arbitration question of compensation owed United States shareholders for El Salvadoran expropriation of assets of El Salvadoran company).

El Salvador

We would recommend that the draft article should also include a reference, where applicable, to draft articles 11 and 12, since those other legal persons might also be natural persons comparable to shareholders.

Guatemala

In civil law systems, there exists a type of hybrid commercial company halfway between the corporation or limited company — whose capital is represented by shares that mark the limits of its shareholders' liability and are freely transferable — and the partnership, whose shareholders are fully liable for the company's debts and cannot easily transfer their portion of its assets. This intermediate type of commercial corporation is the limited liability company — *société à responsabilité limitée in French and Gesellschaft mit beschränkter Haftung* in German. The shareholders of companies of this type, which apparently also exist in at least some countries governed by common law systems under the name of limited liability companies, are similar to the stockholders of corporations or limited companies in that they are liable for the company's debts up to but not exceeding the level of their equity contribution. However, the capital of the limited liability company is not represented by shares of stocks.

There is no doubt that the limited liability company falls within the scope of draft article 13, and consequently draft articles 9 and 10 are applicable to it, as appropriate. However, from a literal standpoint, draft articles 11 and 12 are not applicable, because they are not mentioned in draft article 13. Nevertheless, Guatemala takes the view that draft articles 11 and 12 should be applicable to limited liability companies and their shareholders.

Accordingly, in draft article 13, "9 and 10" should be replaced by "9 through 12 inclusive" and, in paragraph (4) of the commentary on draft article 13, explicit mention should be made of the limited liability company. It would thus be clear that, for the purposes of draft articles 11 and 12, shareholders of a limited liability company would be equivalent to shareholders of a corporation or limited company.

Netherlands

The words "engaged in worthy causes" in paragraph (4) of the commentary on page 67 [English text] are unnecessary and should be deleted. The Netherlands believes that the discretionary authority of the State to exercise diplomatic protection provides sufficient scope.

Qatar

The State of Qatar should like to draw the International Law Commission's attention to the fact that the distinguishing feature of non-governmental human rights organizations, which would be covered by draft article 13, is independence. We fear that the exercise of the right of diplomatic protection by the State of such an

organization could undermine that independence, adversely affecting the organization's relations with its international milieu.

Part three. Local remedies

Draft article 14 — Exhaustion of local remedies

Mexico

Mexico is particularly interested in the application of the exhaustion of local remedies rule. To ensure the correct application of that rule, it is essential that the exceptions to it should be codified. As already noted in its comments on the Commission's reports since 2003, Mexico is in general agreement with the formulation of both the rule and the exceptions to it in the draft articles currently under review.

Netherlands

The Netherlands suggests inserting the following passage in the commentary:

> "No prior exhaustion of local remedies is required for diplomatic action stopping short of bringing an international claim. See Restatement (Third) of the Foreign Relations Law of the United States (1987), paragraph 703, comment d: 'The individual's failure to exhaust domestic remedies is not an obstacle to informal intercession by a state on behalf of an individual'."

The Netherlands also believes that the commentary must make clear whether any distinction is intended between "rule" and "principle".

Finally, the Netherlands notes that the commentary is inconsistent in respect of "claim". Paragraph (3) on page 69 [English text] is somewhat confusing. When read in conjunction with paragraph (5) of the commentary to draft article 1, on page 26 [English text] and paragraph (6), of the commentary to draft article 5, on page 36 [English text], it is unclear whether "claim" must be understood as referring only to a formal claim.

Paragraph 1

Austria

(See General remarks.)

United States of America

Draft article 14, paragraph 1, states that an international claim cannot be brought for an injury suffered by a national unless "the injured person has, subject to draft article 16, exhausted all local remedies". In the commentary accompanying draft article 14, the International Law Commission explains that the article seeks to capture the exhaustion rule provided in the *Case concerning Elettronica Sicula*

S.p.A. (ELSI), which requires that for a "claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success".[24]

The United States agrees that the International Court of Justice's decision in *ELSI* correctly captures the customary international law exhaustion requirement. The United States believes, however, that draft article 14, paragraph 1, should be revised to state:

> "A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before local remedies have been exhausted, subject to draft article 16."

This formulation is a better expression of customary international law than the current draft article because, consistent with *ELSI*, it permits an entity other than the "injured person" to satisfy the exhaustion requirement so long as the essence of the claim was exhausted in municipal court. In *ELSI* the United States brought a claim against Italy alleging that Italy had violated the Treaty of Friendship, Commerce and Navigation between the United States and Italy through its requisition of the ELSI plant and assets. It was undisputed that ELSI, a wholly owned Italian subsidiary of Raytheon and Machlett Laboratories, United States corporations, had challenged the legality of the Government of Italy's seizure of its plant and assets in Italian court, without ultimate success. As a preliminary matter, however, Italy argued that the United States could not assert a claim on behalf of Raytheon and Machlett because those American companies had not challenged the seizure separately in Italian courts, alleging that the seizure was a violation of the Treaty.

The International Court of Justice rejected the suggestion by Italy that the ELSI suit could not satisfy the exhaustion of local remedies requirement. The Court noted that the substance of the claim brought by ELSI, challenging the legality of the requisition given its causal link to ELSI's bankruptcy, was the same as that brought by the United States to the International Court of Justice. Under those circumstances, the Court held that "the [exhaustion of] local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties".[25] In other words, the Court acknowledged that a claim could be exhausted for international law purposes when the essence of the claim was considered by municipal tribunals, irrespective of whether the same person or entity pursued the municipal claim was being diplomatically protected.[26] The proposed reformulation better expresses the holding in *ELSI* by removing a requirement that the "injured person", who is, presumably, the subject of diplomatic protection, be the party exhausting local remedies.

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[24] *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, judgment, *I.C.J. Reports*, 1989, p. 35 at p. 46, para. 59.

[25] Ibid.

[26] Indeed it was in *ELSI*. The Court did consider whether Italian law afforded the American companies a unique remedy not available to ELSI that they were obligated to exhaust. The Court concluded that Italy did not prove the existence of any such remedy, and thus held that remedies were exhausted, allowing the Court to proceed to the merits. Ibid., pp. 35-37 at pp. 46-48, paras. 60-63.

Uzbekistan

In accordance with draft article 14, the exercise of the right of a natural or legal person to protection from the State requires the "exhaustion" of local remedies and, that being the case, it would take a certain length of time for the person to receive protection, taking into account the different legal procedures in individual countries. That in turn might lead to a reduction in the effectiveness of diplomatic protection.

There is a need to indicate means of securing protection besides the "exhaustion" of local remedies and to amend draft article 16 accordingly.

Paragraph 2

Austria

Austria understands the meaning of draft article 14 in a sense that excludes the resort to the international courts or tribunals for the protection of human rights and fundamental freedoms from the definition of "local remedies". Consequently, it is not excluded that a State exercise its right to diplomatic protection simultaneously with the institution of proceedings by an individual against that State before the European Court of Human Rights. That situation can be explained by recognizing that there would be two different disputes that could be addressed in two different forums.

Mexico

Mexico cannot pass over in silence the definition of the term "local remedies" included by the International Law Commission in paragraph 2 of draft article 14. It covers both judicial and administrative remedies open to an injured person before the courts, whether ordinary or special, of the State alleged to be responsible for the injury.

Mexico is pleased to observe in this regard that the Commission has taken into account the judgment of the International Court of Justice in the *Avena* case, in paragraph (6) of its commentary on draft article 14 concerning the exhaustion of local remedies. As the Commission states, while it is true that administrative remedies must also be exhausted, this applies only to those that may result in redress. The injured person is not required to petition the executive power of the State where he exhausts local remedies to grant him relief through the exercise of discretionary powers, since local remedies do not include remedies as of grace, such as executive clemency or a request for a pardon.

Uzbekistan

It seems necessary to insert draft article 14, paragraph 2, in a draft article entitled "Use of terms" (see *Other comments and suggestions*, below) in order to define the concept of "local remedies".

This paragraph also needs revision. To make the text clearer the following wording could be used:

> "'Local remedies' means legal remedies which are open to an injured person. This may include recourse to judicial or administrative courts or ordinary or special bodies of the State alleged to be responsible for the injury."

Draft article 15 — Category of claims

Austria

Austria wonders whether the title of this provision corresponds to the substance of the draft article since the gist of this draft article is connected with so-called mixed claims and the question whether a State claims direct injury where no exhaustion of local remedies is required or indirect injury where the exhaustion is required. The recent decision of the International Court of Justice in the *Avena* case has clearly exposed the problem of this distinction. That judgment only highlights the necessity for a rule as is contained in this draft article.

In its oral comments in the Sixth Committee, Austria asked whether a specific reference to a "request for a declaratory judgment" should be maintained in this draft article since the sole decisive criterion in this context was whether or not there was a direct injury to the State. The introduction of a possible further criterion would only create confusion. The text of the draft provision seemed to suggest that a "request for a declaratory judgment" was to be distinguished from any other "international claim". However, in view of the extensive explanation in the commentary, Austria no longer raises this issue.

Draft article 16 — Exceptions to the local remedies rule

El Salvador

Although we agree with the substance of the draft article, we believe that the wording is complicated in some places and vague in others, and might lead to confusion between its various provisions. We therefore consider that clearer and more precise wording would help present the exceptions to the rule more effectively.

Mexico

(See comments to draft article 14.)

With regard to the exceptions to the local remedies rule, Mexico considers that there is an exception that has not been covered by any of the four subparagraphs in draft article 16. It applies to cases in which it is not necessary to exhaust local remedies in situations if there will be a repetition of the injury.[27] This exception is based on the futility of exhausting local remedies if there is a definite possibility that the act that caused the injury may be repeated.

[27] C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, United Kingdom, Grotius Publications Limited, 1990), p. 206.

Mexico considers it important to stipulate in the draft articles that it is the responsibility of the respondent State to prove that local remedies have not been exhausted by specifying the remedies that still remain open to the claimant. In the event that it can be shown that there are still local remedies to which recourse can be had, the burden of proof as to the existence of some exception to the requirement that local remedies must be exhausted will be on the claimant.[28]

Uzbekistan

(See the comment to draft article 14, paragraph 1.)

Subparagraph (a)

Austria

Austria understands draft article 16, subparagraph (a), as referring also to the availability of local remedies similar to the wording adopted by the International Law Commission in article 44, subparagraph (b), of the articles on responsibility of States for internationally wrongful acts[29] (that is, any "available and effective local remedy"). For the sake of terminological conformity with those articles it would seem sensible to use the same wording here.

Qatar

We view the exceptions set out in subparagraphs (a), (b) and (c) of draft article 16 as being so broad and vague as potentially to render draft article 14 inoperative. They will also contribute to violations of the rule on the exhaustion of local remedies, which is a necessary condition for exercising the right of diplomatic protection. Moreover, these exceptions might lead to differing and conflicting international legal rulings being issued, since the courts would have to examine each case on its own merits in order to determine whether or not local remedies had been exhausted, having no explicit criterion to rely on to determine whether the exceptions set down in draft article 16 apply.

We consider that the exceptions might be acceptable when cases relating directly to fundamental human rights and freedoms are being considered.

United States of America

In the commentary accompanying draft article 16, the International Law Commission explains that it considered three different standards before arriving at the "reasonable possibility of effective redress" standard. The Commission rejected an "obvious futility" standard on grounds that it set "too high a threshold" for proving futility. Likewise the Commission dismissed the European Commission of

[28] R. Jennings and A. Watts, *Oppenheim's International Law* (New York, Longman, 9th edition, 1996), p. 526.

[29] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and corrigendum), para. 76.

Human Rights standard of "no reasonable prospect of success" because it would have allowed claimants to bypass local remedies in too many instances. Instead, the Commission believes that its proffered standard splits the difference and is consistent with international practice.

The United States respectfully disagrees with the Commission's conclusion that the obvious futility standard sets "too high a threshold" for proving futility. Properly understood, we believe it sets a bar that both respects State sovereignty and is consistent with customary international law. We believe that this draft article should state:

> "Local remedies do not need to be exhausted where the local remedies are obviously futile or manifestly ineffective. Exhaustion of local remedies is not obviously futile or manifestly ineffective where a forum was reasonably available to provide effective redress."

Under applicable customary international law principles, a claimant may establish that he need not exhaust local remedies only in the most limited circumstances. It is not enough that a claimant demonstrate that the possibility of success is low or that further appeals are difficult or costly. Rather, for a State to be held liable absent exhaustion of local remedies, "the test is obvious futility or manifest ineffectiveness, not the absence of a reasonable prospect of success or the improbability of success, which are both less strict tests."[30] Under draft article 16, subparagraph (a), the focus of the futility inquiry would be on whether redress is possible, thereby steering consideration towards the possibility of a successful outcome, which Amerasinghe notes is incorrect under international law. Moreover, the assessment of whether a successful outcome is possible is an extremely difficult undertaking. By contrast, the second sentence of the proposed alternative formulation focuses on whether there is a forum reasonably capable of providing redress. Doing so recognizes that the proper test of futility is whether the municipal court system itself is reasonably capable of providing relief. Thus, the focus should be on the availability of a suitable forum rather than on the likelihood of success in that forum.

Moreover, as a policy matter the United States believes the formulation above is preferable to the draft article. The purpose of the local remedies rule is to ensure that a State has the opportunity to address within its own legal system violations of international law.[31] Most, if not all, States have legal systems that have this self-correcting capacity. Under those circumstances, respect for State sovereignty demands that a claimant take advantage of the State's legal system as a condition precedent to invocation of State responsibility for a breach of international law. The

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[30] C. F. Amerasinghe, *Local Remedies in International Law*, p. 195 (1990). See also e.g., Finland v. Great Britain, *3 U.N.R.I.A.A.*, pp. 1479, 1504 (1934) (rule excusing exhaustion is "most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.") (internal citation omitted); Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 824 (1915) ("A claimant is not ... relieved from exhausting his local remedies by alleging his inability, through poverty, to meet the expenses involved, his ignorance of his right of appeal, the fact that he acted on the advice of counsel, or a pretended impossibility or uselessness of action before the local courts.").

[31] *Interhandel Case (Switzerland v. United States of America) (Preliminary objections)*, 1959 *I.C.J. Reports*, p. 6 at p. 27.

formulation advocated by the United States, in addition to being consistent with international law, has the advantage of ensuring that in all but the most extreme circumstances a State has the opportunity to rectify within its own legal system violations of international law. By contrast, the draft article allows claimants to move claims of alleged breaches of international law to international forums before this corrective process is complete, thereby undermining State sovereignty as well as development of the rule of law in municipal judicial systems.

Uzbekistan

It is necessary to specify which national or international body would define the "reasonableness" or "unreasonableness" of resorting to local remedies.

Subparagraph (b)

Qatar

(See comments to subparagraph (a).)

Subparagraph (c)

Austria

Although Austria supports the limitation to diplomatic protection in subparagraph (c) it would, nevertheless, prefer a more elaborated definition of the particular circumstance of the absence of a relevant connection. It is also not clear when the lack of relevant connection must be given: it could be imagined that a person at the moment of the injury was present in the State where it suffered the injury but then left the territory. Could, in such a circumstance, the State whose nationality the person possesses benefit from the exception spelled out in subparagraph (c), or was the relevant connection given as required for the need to exhaust local remedies? The wording of the subparagraph does not provide a clear answer. Unless it is made clear that it is at the moment of injury when the relevant connection must be absent, it could be proposed to link the absence of a relevant connection with "reasonableness" so that no exhaustion would be required only if there were no relevant connection between the injured person and the State alleged to be responsible and the exhaustion of local remedies would be unreasonable. In view of such an approach it could also be suggested to drop the first part of this subparagraph and confine the subparagraph to the situation where the circumstances of the case make the exhaustion of local remedies unreasonable. The commentary could then exemplify this situation by a reference to the absence of a relevant connection. However that solution would exclude a misuse of this subparagraph by a person that suffered an injury and simply leaves the State allegedly responsible in order to circumvent the need for exhaustion of local remedies. The individual could then easily deprive the State allegedly responsible of the possibility to remedy the injury through its own procedures. Taking into account the basic objective of the rule of exhaustion of local remedies, namely to give the State an opportunity to make up for the injury, it is certainly necessary to preclude such an abuse.

Netherlands

The Netherlands considers that the commentary in paragraph (11) on page 82 [English text] should be adopted so that the draft article covers both "legal denial" and "factual denial".

Qatar

(See comments to subparagraph (a).)

United States of America

Draft article 16, subparagraph (c), would allow a claimant to avoid exhaustion of local remedies either where there is "no relevant connection" between the injured person and the injuring State or where exhaustion of local remedies is "unreasonable". The commentary accompanying the draft article explains that the former exception is designed to address the situation where a claimant did not intend to interact with the respondent State, but is nonetheless injured by an action of that State. The classic examples provided are that of cross-border pollution and straying aircraft. The latter exception is, according to the commentary, an attempt to allow for case-by-case exceptions to the local remedies rule where its application appears "unreasonable".

The United States agrees that an exception in this area is warranted where there is no relevant connection between the injured person and the injuring State. We, however, propose that the "unreasonable" component be eliminated to avoid vagueness and excessive breadth. The United States urges that draft article 16, subparagraph (c), be rewritten to state:

> "Local remedies do not need to be exhausted where there is no relevant connection between the injured person and the State alleged to be responsible."

The revision proposed by the United States eliminates the clause providing an exception to the exhaustion of local remedies rule where "the circumstances of the case otherwise make the exhaustion of local remedies unreasonable". That exception is not supported by customary international law or sound public policy concerns. The United States believes that the formulation in subparagraph (c) is vague and introduces too much uncertainty to the application of the exhaustion of local remedies rule. The exceptions provided in the rest of draft article 16 accurately encompass the situations where the exhaustion requirement should not be applied, including those listed in paragraph (11) of the commentary. A lack of factual access to the courts, criminal obstruction of the judicial process and prohibitive cost could all render a remedy "obviously futile", thereby excusing the exhaustion of local remedies requirement pursuant to draft article 16, subparagraph (a). Thus, no further open-ended exceptions are necessary here.

We also believe that the commentary should be clarified to indicate that overflight alone over the territory of a State does not constitute a "relevant connection" requiring exhaustion of local remedies. While the commentary is clear that aircraft that stray into the airspace of a State have no "relevant connection" with

the State, the United States believes that where an aircraft merely flies over a State as part of its planned flight path, no "relevant connection" has been established. The requirement of exhaustion is too burdensome in such circumstances, given the remote link between the injured person and injuring State. By contrast, a merchant trucking goods through a State en route elsewhere does have a more tangible link with the State, including the benefit of using local courts in the through-State to protect his property. Under those circumstances, a "relevant connection" — here, commercial and territorial — has been established, thus mandating exhaustion of local remedies.

Subparagraph (d)

Guatemala

The principle that a State must expressly waive a right is well established in customary international law. However, paragraphs (12), (15), (16) and (17) of the commentary on draft article 16 raise a number of questions concerning the applicability of the principle to waivers of a State's right to require the exhaustion of local remedies.

Nevertheless, it should be pointed out that in many, if not most, cases the above-mentioned problem will not be a problem at all. Where an arbitration agreement is concluded to resolve an already existing dispute in a case in which, under normal circumstances, the rule of exhaustion of local remedies would be applicable to one of the two States parties, it cannot be said that the State has waived, expressly or tacitly, its right to such exhaustion. In fact, something completely different has happened: a rule of customary international law, namely, that requiring the exhaustion of local remedies, has, by virtue of the principle that exceptional circumstances prevail over normal circumstances, been superseded by contradictory provisions contained in a treaty. The mere fact that the waiver is essentially unilateral illustrates that it is incorrect to talk of a waiver in such cases. When treaties provide for the settlement by arbitration of *future* disputes in matters in which, under normal circumstances, local remedies must be exhausted, such treaties are interpreted in order to determine whether or not they prescribe the inapplicability of the relevant rule. If it is found that one of those treaties does impose such inapplicability, it cannot, by the same token, be concluded that the local remedies rule has been waived.

Morocco

We propose to delete subparagraph (d) on the grounds that the provision would diverge from an important principle of international law and, moreover, has no practical significance.

Qatar

The exception in subparagraph (d) is acceptable since it is consistent with general principles of law.

Uzbekistan

The following phrase should be added after the word "exhausted": "or its actions or inaction are tantamount to a waiver".

Part four. Miscellaneous provisions

Uzbekistan

Part four should be called "Other provisions" rather than "Miscellaneous provisions".

Draft article 17 — Actions or procedures other than diplomatic protection

Austria

Draft article 17 protects other legal devices through which the rights of individuals can be ensured. This could lead to a duplication of proceedings in different forums with the possibility of divergent decisions. However, that risk has to be accepted in the interest of effective protection of the rights of individuals.

El Salvador

We should take into account the fact that diplomatic protection exists for cases where the State adopts in its own right the cause of one of its nationals, not the right of nationals for their State to exercise diplomatic protection on their behalf as a result of injury caused by another State. Diplomatic protection cannot therefore be placed at the same level as the existing protection measures provided for in international human rights law. We therefore believe that the wording of draft article 17 should reflect this point.

Netherlands

The words "under international law" should be deleted. The Netherlands is of the opinion that the right to, inter alia, submit an *amicus curiae* brief in domestic proceedings, as the European Union has done in American legal cases, must remain unchanged.

The Netherlands also suggests that draft article 17, like draft article 19, should be amended as follows:

> "The rights of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act are not affected by the present draft articles."

Qatar

There is no need to reaffirm the right of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, since this is already considered an inalienable right of States and individuals under the rules of international law.

If draft article 17 refers to the right of States and individuals to invoke international human rights conventions, then it adds nothing new either. In any event, the fact that States and individuals can resort to international human rights law offers more safeguards than diplomatic protection, because [the former] is based on appropriate and flexible legal principles that help and enable individuals to exercise their rights when their fundamental rights and freedoms are violated.

On the basis of the foregoing, we concur with the view that draft articles 17 and 18 should be merged, and we propose that the resulting draft article should read as follows:

> "The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions concerning the settlement of disputes between corporations or shareholders of a corporation and States."

Uzbekistan

The provisions of draft article 17 should be inserted in a draft article entitled "Use of terms" (see *Other comments and suggestions*, below) in order to define the term "other means of peaceful settlement" (as per draft article 1).

Draft article 18 — Special treaty provisions

Austria

Austria refers to its comments made in connection with draft article 4 concerning nationality. It cannot be excluded that some of the provisions, such as those relating to the issue of nationality, could be replaced by bilateral or regional customary law. It is therefore suggested only to refer to *lex specialis* or simply "to special rules of international law" as it is done in the *lex specialis* provision in the framework of the articles on responsibility of States for internationally wrongful acts (article 55).[32]

El Salvador

We believe that the draft article reflects an idea similar to that contained in draft article 17, and would therefore be in favour of combining them into a single draft article.

[32] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and corrigendum), para. 76.

Morocco

The formulation of the draft article gives rise to ambiguities on two fronts. Firstly, [French text] we do not know what "il est incompatible" refers to. If the phrase refers to "présents articles", it should be recast in the plural.

Second, the draft article refers to special treaties, implying that there are ordinary treaties and special treaties. Nevertheless, in international law, in particular in the *Vienna Convention on the Law of Treaties*,[33] there is no mention of "special treaties". Accordingly, one might either refer to special rules, as was done for the responsibility of States and the responsibility of international organizations, or amend the latter part of the sentence to read: "inconsistent with special regimes provided for under bilateral and multilateral treaties regarding the protection of investments".

Qatar

(*See the comments to draft article 17.*)

Draft article 19 — Ships' crews

Austria

The idea underlying draft article 19 is certainly confirmed by practice. The structure of the draft article, however, should be reconsidered since the present wording could lead to unintended results. It could be asked whether the right of the State of nationality of crew members to exercise diplomatic protection is affected if the condition expressed in the last part of the phrase is not met. That result is certainly not intended. It is therefore suggested first to stress the right of both categories of States to exercise diplomatic protection and then to state that the right of the one State does not affect the right of the other.

Mexico

With regard to draft article 19 concerning ships' crews, Mexico recognizes that the International Law Commission's codification appropriately reflects international law and practice in this sphere. Likewise, it notes with satisfaction that the Mexican delegation's comments on this particular topic in recent years have been taken into account and incorporated by the Commission in this work.

The capacity of the State of nationality to exercise diplomatic protection and the right of the flag State to seek redress on behalf of the ship's crew undoubtedly represent a fundamental development towards ensuring full respect for the human rights of ships' crews. However, paragraph (8) of the commentary on draft article 19 does not resolve the issue of competing claims if both States should seek redress.

[33] United Nations, *Treaty Series*, vol. 1155, No. 18232.

For the above reason, we request the Commission to study this hypothesis so that it may then incorporate in the draft articles or the commentary on draft article 19 a reference that will resolve the issue of dual reparation by the offending State.

Netherlands

(*See the comments to draft article 17.*)

The Netherlands recommends that the draft article be incorporated into draft article 8. This is more consistent with the structure of the draft articles.

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

The Nordic countries fully support the approach in draft article 19, whereby the right to exercise of diplomatic protection by the flag State does not exclude the same right to be exercised by the State of nationality of the members of the crew of a ship and vice versa. This is a very important principle. This solution means that important protective measures established by the law of the sea are consequently not undermined.

United States of America

Draft article 19 would affirm the right of the State of nationality of ship crew members to exercise diplomatic protection on behalf of its nationals without derogating from the right of the State of the nationality of the ship to seek redress on behalf of crew members irrespective of their nationality when they have been injured through an international wrong to the ship. The commentary accompanying the draft article notes that international law is inconclusive on the question of whether a State can extend protection to non-national crewmen, but concludes that international jurisprudence leans towards recognition of a right of redress. The commentary is careful to note that this right to seek redress is not diplomatic protection, but explains that the right closely resembles such protection.

The United States welcomes the commentary's clarification that draft article 19 would not intend to confer a right of diplomatic protection to the State of nationality of a ship for non-national crew members. As we explained in our May 2003 comments,[34] there is great uncertainty as to whether customary international law allows the State of nationality of a ship to protect crew members from a third State.

However, given the fact that the International Law Commission now clearly recognizes in its commentary that this provision does not concern diplomatic protection, the United States believes the draft article is outside the scope of the present project and should be omitted. General Assembly resolution 51/160 of 16 December 1996, inviting this project, asked the Commission to consider "diplomatic protection" alone. Consistent with that mandate, a working group of the Commission reported to the forty-ninth session of the Commission that the draft

[34] On file with the Codification Division.

articles would be limited to "diplomatic protection *stricto sensu*".[35] Given that the draft articles were intended to codify rules of diplomatic protection alone, extension of the project into rights of States to seek redress for crew members risks creating confusion about the scope of the draft articles as a whole and, thus, is unwarranted. Rather, this issue is better left to other international law instruments, such as the United Nations Convention on the Law of the Sea.[36]

The commentary to draft article 19 also states that a purpose of the article is to affirm that the State of nationality of a ship's crew member can espouse his claim. While the United States agrees that this principle is customary international law, its statement here is superfluous. Draft articles 2 and 3 would clarify that a State has the right to exercise diplomatic protection in respect of claims of its nationals where the other requirements of the draft articles are met. Since crew members are nationals, like all others, there is no reason to adopt a separate draft article to note that their claims are cognizable. Rather, if the Commission feels it is necessary, the commentary to draft articles 2 and 3 should include a statement that crew members too are nationals whose injuries are subject to diplomatic protection.

Other comments and suggestions

Netherlands

On pages 19 to 21 [English text] of the fifth report of the Special Rapporteur[37] are two proposed "saving clauses" that might be alternatives to draft articles 17 and 18. The first proposal, an alternative for draft article 17, reads:

> "Article 26
>
> "These articles are without prejudice to the right that a State other than a State entitled to exercise diplomatic protection or an individual may have as a result of an internationally wrongful act."

The Netherlands considers that this draft article can be supported.

The second proposal includes alternative wording for draft article 21 that merges draft articles 17 and 18 into one:

> "These articles are without prejudice to the rights of States or persons to invoke procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act [that might also give rise to a claim for diplomatic protection by the State of nationality of the injured person]."

The Netherlands considers that this "omnibus saving clause" can also be supported.

The sixth report deals with the "clean hands" doctrine. The Netherlands endorses the conclusions of the Special Rapporteur.[38]

[35] *Yearbook ... 1997*, vol. II (Part Two), para. 176.
[36] United Nations, *Treaty Series*, vol. 1833, No. 31363.
[37] See A/CN.4/538, section D, parts 1 and 2.
[38] A/CN.4/546.

United States of America

The United States has not been in a position to review every assertion, footnote and citation provided in the commentaries. Our review of the commentaries has uncovered, however, numerous instances where cases or treatises appear to be cited for propositions that they do not support. We urge the Commission to review carefully the accuracy of the commentaries and characterizations of the materials cited therein.

The United States would like to request that the International Law Commission make clear in the commentaries which draft articles it considers progressive development of the law, as opposed to codification of customary international law. For example, while we do not find draft article 8 objectionable, it is clearly a progressive development of the law and should be characterized as such.

Uzbekistan

In our view, it is necessary to provide an explanation, in a separate draft article entitled "Use of terms", of the following terms used in the draft articles: "nationality of a legal person" [Russian text]; "nationality of a corporation"; "incorporation"; "State of incorporation"; "personal injury"; "damage to property"; "damage to personal non-property rights"; and the like.

Comments on final form

Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

The Nordic countries believe that there is merit in proceeding rather swiftly to the adoption of the draft articles on second reading. Moreover, the Nordic countries do also believe that the provisions on diplomatic protection should, in a relatively short time, be adopted in the form of a Convention. This would enhance legal clarity and predictability in this important field of law.